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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1190

IN THE MATTER OF THE PETITION OF
MICHAEL ALARID, JR., BENJAMIN CHAVEZ, JR.,
ROLAND TOVAR, AND JOSE N. URANGA, JR.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEW MEXICO

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March 1, 1973

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The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of New Mexico entered in this proceeding on December 1, 1972.

OPINION BELOW

The opinion of the Supreme Court of the State of New Mexico, not reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of the State of New Mexico was entered December 1, 1972. The petition for

certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Whether Petitioners have been denied a license to practice law in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment by the Board of Bar Examiners by:

1. The failure to establish ascertainable standards related to competence for the pass-fail determination (the determination of the "passing" score) in a written essay-type bar examination; and

2. The practice of establishing two different "passing" scores — one for out-of-state practicing attorneys and another higher score for recent law graduates — although both "passing" scores purport to distinguish between competence and incompetence.

STATUTORY PROVISIONS INVOLVED

Rules Governing Bar Examiners, Bar Examinations and Admission to the Bar (Effective July 12, 1972). See Appendix A.

Amendment XIV of the United States Constitution

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioners challenge the constitutionality of the procedures established to determine their professional competence to practice law. Said procedures were established by the Supreme Court of the State of New Mexico and administered by the Board of Bar Examiners. See Appendix A.

Each of the four Petitioners, after graduating from an accredited law school in May or June, 1972, took the New Mexico essay-type written bar examination on August 21-23, 1972, administered by the Board of Bar Examiners (hereinafter referred to as Bar Examiners). None passed. The passing score had been set at 67 percent by the Bar Examiners on August 24 *after* reviewing the results of the bar examination. See pp. 108-10 of Transcript. Petitioners' grades, prior to any correction, were: Tovar, 65.33; Uranga, 64.79; Chavez, 63.82; and Alarid, 61.63. See p. 16 of Transcript. At the same meeting on August 24, the Bar Examiners voted to regrade all those examination papers within one percentage point of passing. Eight examinations were in that range. In September, the Bar Examiners regraded those eight examination papers with the result that all eight applicants received passing grades and were admitted to the bar.

Petitioners wrote to the Bar Examiners on September 29, 1972, requesting that their examinations be regraded (at that time no explanation had been given by the Bar Examiners for the regrading). See pp. 29-30 of Transcript. After futile attempts to receive a response, a "Petition For Review of 1972 Bar Examination Procedure and For Admission to the Bar of the State of New Mexico" was filed by Petitioners in the Supreme Court of the State of New Mexico. Petitioners' request for an evidentiary hearing was

granted. On Petitioners' Motion for Subpoena, Discovery and Inspection, the Court granted subpoena power and limited discovery and inspection; however, it specifically refused to permit inspection of those items which would permit comparison of Petitioners' examination papers with successful applicants' papers. More particularly, the Court refused inspection of the examination papers and tally sheets of the following: (1) the eight applicants whose papers were regraded; (2) the applicants with scores between 67 and 70; and (3) random sampling of ten examination papers with scores above 70.

With the above limitations the evidentiary hearing took place before the Supreme Court of New Mexico, sitting in its capacity as supervisor of the bar admission procedures, on November 22 and 23, 1972. Uncontroverted evidence showed that at the meeting of August 24, 1972, the day following the examination, the Bar Examiners met to set the passing score. The grading was by then completed. See p. 108 of Transcript. According to Mr. W. E. Bondurant, Chairman of the Board of Bar Examiners, the passing grade was set at 67. See p. 109 of Transcript. However, two examination papers with grades of 66.99 were passed. In explaining how the passing score was set, Mr. Bondurant testified, "Anyone who had a 70 was automatically passed. From then it was simply a question of collective value judgment. That is about all that I can tell you." He later explained,

> Well, I think that it was a valued (sic) judgment of the Board based on how difficult we thought the examination was; that whether or not this boy was legally competent to represent the people of New Mexico to be turned loose on the public. This may sound ambiguous, but that is about the best explanation I can make of it. See p. 136 of Transcript.

As to the manner by which the passing score was set, Mr. Bondurant testified that there were motions to set the passing grade at 70, then at 69, 68, and finally at 67. In responding to the question if any reasons were given for 67 as the passing score, Mr. Bondurant answered, "No, not that I know of." See p. 110 of Transcript. He further testified that the passing score has varied in past bar examinations. It has generally been below 70 and occasionally below 67. See p. 137 of Transcript.

At the same meeting on August 24, 1972, the Board of Bar Examiners decided to regrade those examination papers within one percentage point of the passing score. According to Mr. Robert D. Taichert, a member of the Board, the Board decided to regrade those papers within one percentage point of passing in order to give applicants the benefit of the doubt. See p. 170 of Transcript. When asked at the hearing if there was any particular reason for having the passing grade set at 67 and then regrading those within one percentage point, Mr. Bondurant answered,

> The reason for it again, in my opinion, is that it was not (sic) collective valued (sic) judgment. We are not law school profs and we were trying to be just and create a leeway in there that would do justice to the applicants. See p. 112 of Transcript.

At the hearing it was explained that the "borderline" examinations were regraded on September 22 and 23, 1972, approximately one month after the examination. However, prior to the regrading, two of the applicants whose examinations were to be regraded had looked at their examinations and had communicated with members of the Board of Bar Examiners. See p. 112 of Transcript. Three members of the Board admitted knowing two of the examinees whose examinations were regraded, and one of them admitted

recognizing one applicant's paper during the regrading. See pp. 115, 171, and 196 of Transcript. All eight papers that were regraded received an average increase of 1.75 percent, and all were passed. See Board Exhibit D.

At the hearing before the Supreme Court of New Mexico the Board of Bar Examiners denied that discrepancies in numbers on the examination answer and on the tally sheet were errors. However, the Board stipulated that there were two mathematical errors made with regard to Petitioners Chavez and Uranga. See MEMORANDUM DECISION, p. xi of Appendix B.

Petitioners discovered for the first time at the hearing that a lower passing grade of 65.83 was set for experienced attorneys. See pp. 94-95 of Transcript. In fact, every experienced attorney applicant passed the examination. See pp. 94-95 of Transcript and Board Exhibit A. The experienced attorneys took two sections of the same examination taken by every other applicant, and their answers were graded with the answers of the other applicants. See p. 142 of Transcript and Board Exhibit A (ID. Nos. 2, 28, 76, 80, and 102 were assigned to the experienced attorney applicants). When Mr. Bondurant was asked to explain the reasoning behind two different passing scores, one for experienced attorneys and another for recent law graduates, counsel for the Board objected on grounds of materiality, and the objection was sustained. See pp. 142-43 of Transcript.

The Supreme Court of New Mexico rejected Petitioners' challenge to the bar examination in a *per curiam* Memorandum Decision and Order of Dismissal on December 1,

1972.[1] See Memorandum Decision in Appendix B hereto. It accepted the "collective judgment" of the Bar Examiners in determining the passing score and the percentage range for regrading. In the words of the Supreme Court of New Mexico,

> The Court is of the opinion that the record fails to disclose any deprivation of due process, equal protection of the law, or any other constitutional right of petitioners, as well as any unfairness or discrimination against them. It conclusively appears that the rule relating to non-identity was meticulously adhered to by the Board and other examiners; that the grading of answers to the examination questions was conducted in a manner as fair and reasonable as is possible in an examination in which judgment is called for by the graders; and that the manner in which a passing grade was fixed by the examiners and the area of borderline cases determined by the Board were fair and reasonable exercises of judgment. See Memorandum Decision, pp. xii-xiii of Appendix B.

It is to review that decision that Petitioners seek a writ of certiorari.

FEDERAL QUESTIONS RAISED

The Petitioners raised their Due Process and Equal Protection issues by Petition and at the hearing of November 22 and 23, 1972, before the Supreme Court of New Mexico. The Court specifically ruled that there was no violation of said constitutional rights. See Memorandum Decision, p. xii of Appendix B.

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[1]The Memorandum Decision does not reflect an important procedural due process issue. In ruling on Petitioners' Motion For Issuance of Subpoena, Discovery, and Inspection the New Mexico Supreme Court refused to permit discovery of "an adequate sample of both passing and failing examination papers." See *Application of Peterson*, 459 P.2d 703 (1969) in which the Supreme Court of Alaska ruled that due process required that Peterson, who was challenging the bar examination, was entitled to such sampling of examination papers.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD DETERMINE WHETHER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT REQUIRE THAT THE DETERMINATION OF COMPETENCE TO PRACTICE LAW AS MEASURED BY A BAR EXAMINATION BE RELATED TO ASCERTAINABLE STANDARDS OF COMPETENCE.

The principal constitutional issue presented by the case below is whether the Bar Examiners may, without violating the Due Process and Equal Protection Clauses of the Fourteenth Amendment, set a passing score for a written bar examination which is unrelated to any standard of competence and whether the passing score may be variable, one score applying to one person and a different score to another.

This Court has long held that a person has a right to practice his chosen profession. *Traux* v. *Raich*, 239 U.S. 33 (1915); *Baird* v. *State Bar of Arizona*, 401 U.S. 1 (1971). It is a matter of "right" and not "a matter of grace and favor." *Ex Parte Garland*, 4 Wall 333, 379 (1896). That right is constitutionally protected. *Willner* v. *Committee on Character*, 373 U.S. 96 (1963). *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957).

The qualifications standards of an applicant for bar admission ". . . must have a rational connection with applicants' fitness or capacity to practice law." *Schware*, *supra* at 238. Thus, whether the standard being tested is one for

good moral character, as in *Schware,* or one for professional competence as in the case at bar, those standards must be ascertainable.

Since there is a constitutionally protected right to practice law on the part of those who are competent, it follows that the power to admit attorneys is not an arbitrary one to be exercised at the pleasure of the court. *Cohen v. Hurley,* 366 U.S. 117 (1961). Indeed, "[a] state cannot exclude a person from the practice of law . . . in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware, supra* at 238-39. Implicit is the constitutional requisite that standards be set. Once the standard for professional competence is established, the "permissible standard," the Bar Examiners may not discriminate among the applicants.

> Even applying permissible standards, officers of a State cannot exclude an applicant . . . when their action is invidiously discriminatory. *Schware, supra* at 239.

The Court below did not apply the constitutional mandate that: (1) standards be established, and (2) applicants not be discriminated against.[2] It held that, as a matter of law, the passing score may be set after the examination is given and after the examination papers are graded. The score

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[2]The question of possible ethnic discrimination against Chicanos, those of Spanish-American descent, in the case at bar was raised by *amicus.* Mr. Taichert, member of the Bar Examiners, testified that 9 of 18 Spanish Surnamed applicants passed the August, 1972 examination whereas of a total of 127 only 26 failed. See pp. 223-24 of Transcript. Our calculation, assuming the accuracy of those figures, follows:

Anglos passed	84%
Chicanos passed	50%
Anglos failed	16%
Chicanos failed	50%

Such a disparity would appear to raise a *prima facie* case of discrimination. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

may be established merely by the "collective value judgment" with no reference to any standard of competence. Further, the Bar Examiners may set the minimum passing score for recent law graduates, like Petitioners, at 67 percent, and for other examinees, out-of-state attorneys, at 65.8 percent.

The following testimony, referred to in the Statement of the Case, relating to the manner in which the passing score was established underscores the lack of standards and consequent arbitrariness:

Q: [By Mr. Mario Obledo, Attorney for Petitioners] Do you recall the main business discussed at that meeting?

A: [By Mr. W. E. Bondurant, Chairman of the Board of Bar Examiners] The main business was to set the passing grade and take the numbers who had passed or failed.

Q: What passing grade was established?

A. 67.

Q: How did you arrive at the figure 67, Mr. Bondurant?

A. Anyone who had a 70 was automatically passed. From then it was simply a question of a collective value judgment. That is about all I can tell you.

Q: Did anyone make a motion that the passing grade be 68?

A: Yes.

JUSTICE MONTOYA: 68 or 67?
MR. OBLEDO: No, 68.

A: As I recall, it went to 70, 69, 68, and you would get arguments at each grade.

Q: And then a motion was made for a passing grade of 67?

A: Correct.

Q: And that was the one that was acted upon?

A: Correct.

Q: Were any particular reasons given as to why 69 was not chosen?

A: No, sir.

Q: Or 68?

A: No.

Q: Any reasons given for the figure 67?

A: No, not that I know of.

Q: Do you recall what the votes were for the grade 69?

A: I do not.

Q: Or 68?

A: I do not.

See pp. 108-10 of Transcript.

Thus, the only measure of competence was a "collective value judgment," a judgment that was accepted by the Supreme Court of New Mexico as proper. A "collective value judgment" is not a standard by which to measure competence.

The underlying mandate which a state must follow is to establish a standard by which examinees' competence will be measured. That standard must be ascertainable. Decisions made as to professional competence, without reference to any standard of competence, are by their nature arbitrary.[2]

[2]The evident proposition that lack of standards in bar admissions permits arbitrary action has been recognized by the New Mexico Supreme Court as well. See Rask v. *Board of Bar Examiners*, 75 N.M. 617; 409 P.2d 256 (1966).

For support in other areas, see *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, (1972).

The Court below, in ruling that no standards need be utilized, has misread the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

This Court, through its decisions, has given guidance to Bar Examiners regarding the Procedural and Substantive Due Process requirements when an applicant is denied admission because of the state's standard of "good moral character." *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957); *Willner* v. *Committee on Character,* 373 U.S. 96 (1963); *Baird* v. *State Bar of Arizona,* 401 U.S. 1 (1971). Thus, in *Schware,* for example, when the state court ruled that a person who had belonged to the Communist Party as a young man was, as a matter of law, a person of questionable character, this Court reversed. That standard violated due process.

Equally important are the Procedural and Substantive Due Process and Equal Protection requirements when applicants are denied admission to the bar on the basis that they have failed to meet the standard which the state has set regarding professional competence. This Court has not had occasion to rule on this issue. As the case at bar demonstrates, this Courts' guidance is essential. This is a matter of first impression before this Court.

II

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING CONSTITUTIONAL ISSUES AFFECTING THE BAR EXAMINATIONS OF EVERY STATE IN THE UNITED STATES.

The issues in this case concern the application of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the pass-fail determination in bar examinations. These issues are of extreme significance to the Petitioners who have been excluded from the practice of law after having successfully completed the prescribed three-year curricula in accredited law schools. They have been denied entry into the legal profession solely on the basis of a determination that their scores on the bar examination were not "passing." Whether this determination, as applied to Petitioners, had any rational connection to the qualification of competence is an issue of such importance to warrant review by this Court.

The significance of these issues, however, extends beyond the interests of these Petitioners. These issues concern the bar admission process not only in New Mexico but in every state of the United States. A total of fifty-four jurisdictions administer an examination of some kind as part of their bar admission process.[4] Furthermore, each year thousands of law school graduates will be taking bar examinations as a prerequisite to admission to the bar. In 1971, for example, 27,904 persons took bar examinations; and of these examinees, 20,004 or 72 percent passed.[5] Even more applicants can be expected to take bar examinations in the years to come due to the recent increased enrollment in American

[4]See *Admission to the Bar by Examinations in 1971*, 41 Bar Examiner 126-27 (1972).

[5]Id.

law schools. Total enrollment in American Bar Association approved law schools has risen from 94,468 in the fall of 1971, to 101,707 in the fall of 1972.[6] In addition, the number of J.D. and LL.B. degrees awarded increased significantly from 17,006 in 1971, to 22,342 in 1972.[7] Of particular interest is the substantial number of minority law students; total minority enrollment in 1972 stands at 5,568.[8]

The resolution of the issues in this case will affect the opportunity of the present generation of law students, and future generations as well, to enter the legal profession. Admission to the bar is an open-ended system. *All* applicants who meet the prescribed qualifications, including the qualification of competence, must be admitted to the practice of law. *Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957). Since bar examinations, both essay and objective,[9] are used to measure competence, the passing score must be rationally connected to competence. It is not enough that a bar examination measure relative competence; it must also differentiate between those examinees who are competent and those who are incompetent. To the extent that a particular passing score on a bar examination excludes competent applicants, the determination of the pass-fail line is

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[6]Rudd, That Burgeoning Law School Enrollment Slows, 59 A.B.A.J. 150 (1973).

[7]Id.

[8]Id.

[9]A multiple-choice test was used on a national basis for the first time in 1972. This test, the Multistate Bar Examination (MBE) was prepared by the National Conference of Bar Examiners with the technical assistance of the Educational Testing Service (ETS). Twenty-seven states administered the MBE in 1972 as part of their bar examination process. Each state also gave a locally prepared and locally graded examination. The MBE is scored by computer by ETS on the basis of the total number of correct answers. ETS then reports to each state the scores of its applicants. The MBE sets no passing score, but rather leaves to each state the use of the MBE scores in any manner it wishes. For an explanation of the MBE, see Covington, The 1972 Multistate Bar Examination, 41 Bar Examiner 146 (1972).

arbitrary and capricious. Furthermore, to the extent that the passing score is determined without regard to any standards related to competence, that determination is likewise arbitrary and capricious. Applicants to the bar and bar admission committees are in need of guidance by this Court as to the requirements of due process and equal protection as applied to the pass-fail determination. In particular, bar admission committees need guidance with respect to the constitutional limits on their discretion in setting the pass-fail line.

The significance of these issues is underscored by the increasing concern over the objectives, procedures, and consequences of bar examinations. Lawsuits involving challenges to bar examinations are pending in Alabama, Arizona, Georgia, Maryland, New Mexico, Ohio, South Carolina, and Virginia.[10] Other suits have been filed in Alaska, California, Idaho, and Utah.[11] Although the issues in this case are not specifically involved in the above-mentioned cases, largely discrimination suits, the issues presented by this

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[10]According to the National Conference of Bar Examiners, the above lawsuits involving bar examinations have been brought to their attention. Most involve alleged discrimination against minority groups. Petitioners have been unable to verify the fact that *all* of these lawsuits have been filed. However, docket numbers have been obtained for the following cases: Alabama — United States District Court for the Middle District of Alabama, Docket No. 3809-N; Arizona — United States District Court for the District of Arizona, Phoenix, Docket No. 71-692; Georgia — United States District Court for the Northern District of Georgia, Docket Nos. 15,688, 15,832, 15,866, 15,867; Maryland — United States District Court for the District of Maryland, Docket No. 72-964K; New Mexico — United States District Court for the District of New Mexico, Docket No. 9576; Ohio — United States District Court for the Southern District of Ohio, Docket No. 73-16; South Carolina — United States District Court for the District of South Carolina, Charleston, Docket No. 72-1219; Virginia — United States District Court for the District of Virginia, Richmond, Docket No. 505-72R.

[11]Again, Petitioners are unable to verify the existence of these lawsuits since the source of information regarding these cases is the National Conference of Bar Examiners. However, Petitioners have learned that the California suit (Supreme Court of California, Docket No. 22.928) has been dismissed.

Petition constitute one of the most basic challenges to bar examinations. It is a challenge that can be made to any kind of bar examination, essay or objective, in any state; and it is a challenge that will be made with increasing frequency until the due process requirements as they apply to the pass-fail determination are set forth by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of New Mexico.

Respectfully submitted,

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March 1, 1973

APPENDIX A

Rules Governing Bar Examiners Bar Examinations and Admission to the Bar

(Effective July 12, 1972)

BAR EXAMINERS

RULE 1. *Board of Bar Examiners.* The Board of Bar Examiners shall be composed of seven members of the State Bar. They shall be appointed by the Supreme Court of New Mexico upon recommendation by the Board of Commissioners of the State Bar, and shall be charged with the following duties:

(a) Investigating the professional qualifications and good moral character of applicants for admission to the Bar of New Mexico.

(b) Preparing and administering examinations for admission to the Bar of New Mexico.

(c) Consulting with the Disciplinary Board and making specific recommendations to the Supreme Court with respect to the reinstatement or readmission to practice of lawyers who have been disbarred or suspended from practice in New Mexico by the Supreme Court.

* * * * * *

ELIGILILITY OF APPLICANTS

RULE 8. *Qualifications.* Every applicant for admission to the Bar of New Mexico shall file a complete application as prescribed in Rule 9, and must meet the qualifications hereinafter set forth. The mere filing of an application shall

not entitle an applicant to admission to the Bar. Each applicant shall have the burden of demonstrating to the satisfaction of the Board that he or she is:

(a) A citizen of the United States of America and at least twenty-one years of age.

(b) A graduate of a law school fully accredited by the American Bar Association. This requirement shall not apply to an applicant who has been actively engaged in the full-time practice of law in some other state or states for at least three of the five years immediately preceding his application for admission to practice in New Mexico. The Board of Bar Examiners may in its discretion waive this requirement to permit admission on examination of a graduate of a law school of a foreign country having the common law legal system, if the applicant has been admitted to practice in such country.

(c) A person of good moral character, physically and mentally fit to practice law. To enable the Board of Bar Examiners to reasonably investigate the qualifications of the applicant to practice law, no applicant will be admitted to practice law in New Mexico until the applicant has been an actual bona fide resident and domiciliary of New Mexico for at least ninety (90) days immediately prior to admission, during which period the applicant must have been physically present in New Mexico for at least seventy-five (75) days. Each applicant shall evidence fulfillment of the requirements of this paragraph by written certificates of three members of the Bar of New Mexico supplied in accordance with Rule 26.

(d) If ever admitted to practice in any other state or states, in good standing in each such state and not disbarred, not under disciplinary suspension, not having resigned from such bar while under disciplinary investigation, and not the subject of any pending disciplinary proceedings in any such state.

(e) Professionally qualified for admission to the Bar

of New Mexico. All applicants shall be required to take and pass the written examination provided in Rules 11 through 20, except as otherwise provided in Rule 14 with respect to law faculty at the University of New Mexico.

* * * * * *

BAR EXAMINATIONS

RULE 12. *Necessity of Written Examination.* All applicants for admission to the Bar of New Mexico shall be required to take and pass a written examination prescribed by the Board of Bar Examiners in accordance with these rules; except that written examination may be waived, in the discretion of the Board, for University of New Mexico law faculty who fulfill the requirements of Rule 14 hereof.

RULE 13. *Experienced Attorney's Examination.* All applicants, except attorneys in practice for five (5) years or more as hereinafter defined and except for law faculty qualifying under Rule 14 hereof, must take the general examination, and the number of questions to be included in such examination shall be fixed by the Board. "In practive years or more" means continuously engaged in the active full-time practice of law for at least five of the six years immediately preceding the filing of the application. "Continuously engaged in the active full-time practice of law" means spending the majority of the applicant's time at gainful employment in the performance of legal services which cannot lawfully be performed by a non-lawyer. Attorneys in practice five years or more may, in the discretion of the Board, be permitted to take an abbreviated examination covering the same subject matter described in Rule 18, which shall be given at the same time and place as the general examination. To meet the qualifications of this rule, the applicant must have demonstrated to the satisfaction of the Board that his experience and qualifications are such as to qualify him to take the Experienced Attorney's Examination as prescribed in this rule. In determining whether or not an applicant's experience and qualifications are such as to qualify him to take the Experienced Attorney's Exam-

ination, the Board shall take into consideration the following factors:

(a) The nature and extent of the applicant's general and legal education.

(b) The nature and extent of the applicant's business or professional experience other than in the practice of law.

(c) The nature and extent of the applicant's experience in the practice of the law and the length of time, if any, since applicant has engaged in the practice of law.

(d) An applicant hereunder shall furnish certificates of good moral character from three (3) members of the Bar of the foreign state where he or she last practiced, recommending his or her admission to the New Mexico Bar, and a certificate by a judge or clerk of the highest court of original jurisdiction in each foreign state where the applicant has practiced, or, in lieu thereof, shall furnish such certificates and evidence as may be prescribed by the Board.

Each Experienced Attorney's Examination will last one day and shall include such number of questions, oral or written, or both, as shall be fixed by the Board.

* * * * * *

RULE 17. *Purpose of Examination.* The bar examination is for the purpose of testing the applicant's professional competence to practice law, including the ability to reason logically, to analyze accurately the problems presented to him, and to demonstrate a thorough knowledge of the fundamental principles of law and professional ethics and their application. The examination shall not be designed primarily for the purpose of testing information, memory or experience.

RULE 18. *Subjects for Examination.* In the selection of subjects for bar examination questions, the emphasis shall be upon the basic and fundamental subjects which are

ordinarily taught in accredited law schools. The questions shall be selected from among the subjects listed below:

(1) Torts
(2) Contracts
(3) Constitutional Law
(4) Wills, Trusts and Estates
(5) Real Property
(6) Evidence
(7) Criminal Law
(8) Personal Property
(9) Corporations
(10) Partnerships
(11) Equity
(12) Federal Jurisdiction and Rules of Civil Procedure
(13) Commercial Law (including the Uniform Commercial Code)
(14) Domestic Relations
(15) Agency
(16) Conflict of Laws
(17) Basic Principles of New Mexico Community Property Law
(18) Legal Ethics and the Code of Professional Responsibility
(19) Basic Principles of Federal Income, Estate and Gift Taxation
(20) Administrative Law

RULE 19. *Questions.* The major portion of the bar examination shall consist of questions in the form of hypothetical fact problems requiring essay answers. Questions shall not be generally designed to test knowledge uniquely based upon local case or statutory law; however, subjects of substantial local interest may be included. Questions will not be labeled as to subject matter. The identical questions should ordinarily not be repeated in subsequent examinations. Sufficient time will be allowed for answering the questions to permit the applicant to make a careful analysis of the facts and to prepare well-reasoned answers.

RULE 20. *Preparation of Questions.* The Board of Bar Examiners may utilize the services of expert draftsmen to prepare bar examination questions, either by arranging for the drafting services of qualified persons, including, without limitation, out-of-state law teachers, or by using the services of the National Conference of Bar Examiners or other appropriate state or national agencies. The law faculty at any law school in New Mexico may not prepare questions for the New Mexico Bar Examination. Before a question is accepted for use in a bar examination, whether drafted by the examiners or by expert draftsmen, every point of law presented in the question shall be approved by the Board of Bar Examiners.

RULE 21. *Administration and Grading.*

(a) *Non-Identity Grading.* At the beginning of each examination every applicant shall be assigned an examination number at random. Grading shall be strictly anonymous, and the information matching the names and numbers of the applicants shall be kept in the custody of the Chief Justice of the Supreme Court, or his designee, until all papers have been finally graded, and each paper given either a "passed" or "failed" grade by examination number.

(b) *Uniformity of Grading.* In order to assure maximum fairness and uniformity in grading, the Board of Bar Examiners shall prescribe standards for grading to be used by all graders; and, to the extent possible, all the answers to a particular question shall be graded by the same grader.

(c) *Expert Graders.* The Board of Bar Examiners is authorized to utilize the services of graders who meet the qualifications for Bar Examiners prescribed in these rules. Such graders shall from time to time be appointed with the consent and by order of the Supreme Court upon recommendation of the Board of Bar Examiners.

(d) *Borderline Reappraisal.* The Board of Bar Examiners shall make reappraisal of borderline cases as appropriate to assure fairness in grading.

EXAMINATION RESULTS AND RE-EXAMINATION

RULE 22. *Examination Results.* Upon completion of grading, the Secretary of the Board shall post a list of names of those persons passing. No information will be divulged concerning the applicants who failed. An applicant who fails any bar examination shall be authorized to review his or her examination results as provided in these rules.

RULE 23. *Unsuccessful Applicants—Right of Review.*

(a) Beginning thirty (30) days after the results from each examination are posted and ending on the sixtieth day thereafter, any unsuccessful applicant shall be entitled to a reasonable review of: (1) the questions on the examination; (2) the unsuccessful applicant's answers to the questions; (3) a sample of a passing answer for each question on that examination.

(b) Each applicant will make prior arrangements for such review with the Secretary of the Board of Bar Examiners, who will designate a time and room in the Supreme Court Building at Santa Fe for such review.

(c) No applicant may procure copies of or remove the questions, the applicant's answers, or the sample passing answers.

RULE 24. *Re-Examination.* If an applicant fails to pass his or her first examination, he or she may take four subsequent examinations. Upon an applicant's failure to pass four examinations, he or she shall be required to wait at least one year before being permitted to take the fifth examination. Any applicant who has failed, or may hereafter fail, five examinations, shall be ineligible to take another examination. Any applicant who has taken either the first or second regularly scheduled bar examination following the filing of his or her application, or who has taken both such examinations, and who desires to take a subsequent examination within twelve months after the last day of the

first regularly scheduled examination following the filing of his or her application, shall so notify the Secretary of the Board in writing and file a supplemental written application at least sixty days prior to the date fixed for such examination and shall pay a supplemental fee of $35.00. Any applicant who, prior to April 1, 1971, failed three examinations, shall be permitted to take two subsequent examinations upon filing a new application and payment of the fees fixed by Rule 9.

LICENSES

RULE 25. *General.* Licenses to practice law shall be granted only to applicants who fulfill all the requirements of these rules and either (a) pass the examination; or (b) are University of New Mexico law faculty qualified and recommended for admission by the Board of Bar Examiners pursuant to Rule 14.

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APPENDIX B

Memorandum Decision of the Supreme Court of the State of New Mexico

PER CURIAM.

This cause came before this Court in the form of an Evidentiary Hearing on the issues presented by the Petition for Review of the 1972 Bar Examination Procedures and for Admission to the New Mexico Bar, filed herein by petitioners, the Response thereto filed herein by the New Mexico Board of Bar Examiners, and the announcement by the Court as to the scope and extent of the issues which would be considered in these proceedings. The Court granted a hearing on the Petition pursuant to the Court's exclusive jurisdiction to define and regulate the practice of law in the State of New Mexico and because the integrity and fairness of the processes adopted by the Court for admission to the Bar of this State had been questioned, because the petitioners claimed to have been denied equal protection of the law, due process of law, and the right to be admitted to the Bar, or at least to have their examination papers reviewed and regraded, and because the Court wished to be informed as to the effectiveness of its Rules Governing Bar Examiners, Bar Examinations and Admission to the Bar of the State of New Mexico, which rules were adopted and became effective on July 12, 1972.

In the supervision of bar examinations the Court has a dual responsibility. The first, and most important of these, is its responsibility to assure the people of New Mexico that those admitted to practice law in this State are qualified in every respect to discharge their professional responsibilities, and, insofar as reasonably possible, to protect the public against injustices which often result from representation by incompetent attorneys. The second of these

is its responsibility to insure that examinations are conducted fairly and impartially in all respects as to all who are examined.

It is rather ironic that a consideration of the record in this case as a whole demonstrates that the very features of the bar examination out of which the complaints and recriminations made by petitioners have arisen were adopted and made effective by the Court out of consideration for those taking the examination and in an effort to be fair and helpful to them, especially to those who were unsuccessful. For example, petitioners have complained of the grading process, and yet it is clearly established that our examiners went to great lengths to achieve absolute fairness in this process. There has been instituted and long followed a system of grading on the basis of numbers assigned to those taking the examination, which makes it impossible for the graders to know whose paper is being graded. To insure uniformity in grading, instructions are given to the graders and the same grader evaluates and grades all the answers to the same question.

Petitioners quarrel with the establishment of 67 as a passing grade, but this is lower than the generally considered passing grade of 70 and was fixed by the examiners in an effort to insure fairness. The establishment of 67 as a passing grade represented an exercise of the collective judgment of a majority of the highly qualified examiners, including the experienced and highly qualified members of the Board of Bar Examiners. Had the decision been left to this Court, the passing grade might well have been higher.

Another source of controversy was the regrading of borderline papers. This procedure of regrading was also adopted from the same impulse and in an effort to be entirely fair to and considerate of those taking the examination. As applied in practice by the Board, we find absolute fairness in the regrading procedures followed. Nothing was presented by petitioners which would indicate that the 1%, or one-one-hundreds of 1%, criterion which was followed by the Board is unreasonable. All papers which had been

given a grade of 65.99% or above, but less than 67%, were regraded. Nothing presented to us indicates this percentage range for regrading was in any way arbitrary or unreasonable, or was arrived at by the Board in an arbitrary or unreasonable manner. This determination of the Board, again, represented the collective judgment of the Board members, and was made in compliance with our rule and not as a result of a request from any person. The rule and procedures concerning non-identity grading were meticulously followed and preserved throughout the grading and the regrading of the borderline cases.

It is suggested that there was some confusion in the announcement of the names of those who initially passed the examination and in the regrading process. The Court is of the opinion that the Board and the Clerk of this Court, who serves as secretary to the Board, cannot reasonably be criticized because of the unusual happenstance of two persons who took the examination having identical surname, given name and middle initial. Much has been said about arithmetical errors, when the only such errors brought to our attention were a one percentage error in the grade of Mr. Uranga on one section of the examination, and a minor error in the grade of Mr. Chavez on one question occasioned by a mistake in transposition by one of the graders. Neither of these mistakes, when corrected, gave either of these petitioners a passing grade of 67%, or brought either of them within the regrading area of 65.99% or above, but less than 67%.

It is true the initial grading was done under some time pressure. For many years it has been the custom to announce the names of those who passed the examination on the day following the completion of the examination. This custom worked well when a fewer number of applicants were taking the examination, but it did not work well when the numbers taking the examination increased to 127. The custom will no longer be followed and the names of those passing the examination will not be announced until the examiners have had ample opportunity to complete and have completed the grading process in its entirety, includ-

ing the re-evaluation of borderline cases. As an aside, we observe that the custom was initiated and followed out of consideration for those taking the examination and a desire to inform them as soon as possible as to whether or not they had passed the examination.

Finally we come to the situation created by the adoption of our rule that an applicant failing the examination shall be entitled to a reasonable review of (1) the questions on the examination; (2) the unsuccessful applicant's answers to the questions; and (3) a sample of a passing answer for each question on that examination. The sole purpose of this rule is to permit an unsuccessful applicant to determine his deficiencies in order that he may be aided in his efforts in future examinations. Unforeseen confusion may have resulted from the placing of notations on the examination papers by some of the graders solely for the grader's own guidance in grading the answers to the questions. We are instructing that in the future no notations or markings be placed upon the examination papers by the examiners.

The Court questions whether permitting unsuccessful applicants to inspect their papers after the completion of an examination serves the intended purposes for granting this permission. However, the rule granting this permission will remain in effect for at least one more examination. If experience at that time, or at any future time, is similar to what it was following the August 1972 examination, the Court will feel obliged to change that rule.

The Court is of the opinion that the record fails to disclose any deprivation of due process, equal protection of the law, or any other constitutional right of petitioners, as well as any unfairness or discrimination against them. It conclusively appears that the rule relating to non-identity was meticulously adhered to by the Board and other examiners; that the grading of answers to the examination questions was conducted in a manner as fair and reasonable as is possible in an examination in which judgment is called for by the graders; and that the manner in which a passing grade was fixed by the examiners and the area of borderline

cases determined by the Board were fair and reasonable exercises of judgment.

The members of the Board give unselfishly of their time and efforts in the performance of this vital process to the public, to the legal profession, and to this Court in the administration of its jurisdiction over admissions to the Bar of the State of New Mexico. This Court is appreciative of these invaluable services and is pleased with the sense of dedication and fairness shown by each member of the Board in the discharge of his duties as a member.

For the reasons stated, the Court concludes that petitioners have wholly failed to establish by the evidence the allegations of their petition to the effect that their constitutional rights have been invaded and they have been treated unfairly and with discrimination. The relief sought should be denied and the Petition dismissed.

IT IS SO ORDERED.

/s/ JOHN B. MCMANUS, JR.
Justice

/s/ LAFEL E. OMAN
Justice

/s/ DONNAN STEPHENSON
Justice

/s/ SAMUEL Z. MONTOYA
Justice

/s/ BEN C. HERNANDEZ
Judge,
Court of Appeals

APPENDIX C

Judgment Below In the Supreme Court of the State of New Mexico

In the Matter of the Petition of
MICHAEL ALARID, JR.,
BENJAMIN CHAVEZ, JR.,
ROLAND TOVAR, and
JOSE N. URANGA, JR.,
for Court Review of the August
1972 Bar Examination Procedures
and for Admission to the
New Mexico Bar.

Cause No. 9580

An Original
Proceeding

ORDER OF DISMISSAL

This cause having come on for hearing pursuant to the order of the court; the parties having adduced their evidence and rested their respective cases; the court having entered its Memorandum Decision herein; and this cause now being ready for the entry of a final order therein,

IT IS ORDERED AND ADJUDGED that the Petition heretofore filed in this cause be, and the same is hereby, dismissed with prejudice, and the costs of this suit shall be assessed against petitioners.

ENTERED AT SANTA FE, NEW MEXICO this 1st day of December, 1972.

/s/ JOHN B. MCMANUS, JR.
Justice

/s/ LAFEL E. OMAN
Justice

/s/ DONNAN STEPHENSON
Justice

/s/ SAMUEL Z. MONTOYA
Justice

/s/ BEN C. HERNANDEZ
Judge,
Court of Appeals